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MICHAEL RODAK, JR., CLE

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1972

No. 72-1201

100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., a corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

**PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit**

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UNITED STATES OF AMERICA, *Respondent*.

## PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

*To the Honorable Warren Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Your petitioner, Drake's Beach Estates, Inc., a corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 25, 1972.

## OPINIONS BELOW

No opinion was rendered by the District Court for the Northern District of California. Its Judgment was entered May 7, 1970. (App. A, Infra, p. i).

The United States Court of Appeals for the Ninth Circuit delivered a written judgment and opinion by the Honorable Fred M. Taylor, District Judge sitting by designation, on September 25, 1972, reported at 468 F. 2d 1261. (App. B, Infra, p. xiv).

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## JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on September 25, 1972. (App. C, Infra, p. xxxiii). Timely petitions for rehearing were denied on December 6, 1972. (App. D, Infra, p. xxxiv). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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## QUESTIONS PRESENTED

1. In a jury trial of a condemnation case, what elements of just compensation are for the Court's consideration and determination without the intervention of the jury?

2. In a jury trial of a condemnation case, is it the trial judge's or the jury's function to determine an appropriate rate of interest on the judgment and award reasonable litigation expenses?

3. In a condemnation case in which the Government denies the owner's title to the property and

asserts public ownership, is the owner entitled to reimbursement of his reasonable litigation expenses as an element of just compensation if he successfully carries the burden of proving his title?

4. In a condemnation case, is the owner entitled to reimbursement of his reasonable litigation expenses as an element of just compensation?

---

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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## STATEMENT OF THE CASE

This action commenced on October 23, 1963, when the United States (herein referred to as the Government) filed its complaint in condemnation for the expropriation of a portion of a small peninsula of real estate locally known as "Limantour Spit", located

between Drake's Bay and the Pacific Ocean at Point Reyes, Marin County, California.

The complaint alleged jurisdiction based upon 40 U.S.C. §258a and named Drake's Beach Estates Inc., a corporation, as a defendant claiming an interest in the real property. Filed with the complaint was a declaration of taking with a security deposit of one dollar ($1.00). Accordingly, the Government took possession of the land. The case was subsequently bifurcated for trial.

At the first phase of trial the Government contested Drake's Beach Estates' title. It took the position that Drake's Beach Estates did not have any right, title or interest in the property in that the property was already publicly owned. At great monetary expense Drake's Beach Estates successfully carried the burden of proving its title before the Honorable Lloyd H. Burke sitting without a jury. Judgment affirming title in Drake's Beach Estates was filed on June 29, 1966.

At the second phase of trial which commenced on September 8, 1969, again before the Honorable Lloyd H. Burke, but with the intervention of a jury, the issue of the value of the property was submitted to the jury. The jury in its verdict found the value of the land to be substantially in excess of the Government's evidence, returning a verdict in the amount of $700,000. A judgment confirming Drake's Beach Estates' ownership and awarding it $700,000 plus interest at the rate of 6% was entered by the District Court on May 7, 1970. (App. A, Infra, p. i).

The Government appealed the judgment as to title and value to the Court of Appeals for the Ninth Circuit. Drake's Beach Estates cross-appealed, limiting its appeal to the District Court's denial of the prevailing market rate of interest on the judgment award and the failure of the trial court to award Drake's Beach Estates reimbursement of its litigation expenses which exceeded $150,501.88.[1] These expenses were primarily fees paid to experts and consultants who performed services in preparing the case for trial and who testified at trial. A substantial portion of them was incurred by Drake's Beach Estates in successfully proving its title and the size and dimensions of the subject property. No part of this $150,501.88 represents attorneys' fees, which were also substantial.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. In denying Drake's Beach Estates the relief it sought on appeal, —i.e. interest on the judgment award at the prevailing economic rate and reimbursement of litigation expenses—the Court of Appeals based its decision upon Drake's Beach Estates' failure to introduce evidence on these issues to the jury, a basis which was neither urged by the parties at trial or on appeal, nor considered by the District Court.

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[1]Drakes's Beach Estates also appealed the trial court's failure to require prompt deposit and payment of the judgment award. This issue was rendered moot while the case was pending in the Court of Appeals for the Ninth Circuit when the government deposited the judgment award pursuant to an order of the Court of Appeals.

## REASONS FOR GRANTING THE WRIT

### I

### THE DECISION OF THE COURT OF APPEALS AS TO THE PROPER ROLE OF JUDGE AND JURY IN A CONDEMNATION CASE CONFLICTS WITH A DECISION OF THIS COURT.

The Court of Appeals in denying Drake's Beach Estates recovery of interest on the judgment award at the prevailing economic rate and reimbursement of reasonable litigation expenses based its decision upon its determination that Drake's Beach Estates failed to timely present evidence in support of its positions to the jury. *The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States,* 437 F. 2d 458, 460 (Ct. Cl. 1971). Drake's Beach Estates did not present its evidence to the jury but did offer to present it to the trial judge while the jury was deliberating. This holding of the Court of Appeals is contrary to the decision of this Court in *United States v. Reynolds,* 397 U.S. 14 (1970), a case in which this Court defined the role of judge and jury in a condemnation case. Therein this Court held that since there is no constitutional right to a jury trial in a condemnation case, the role of a district judge is much broader than in a conventional jury trial. It is for the trial judge "to decide 'all issues' other than the precise issue of the amount of compensation to be awarded." *United States v. Reynolds, supra,* 20.

The specific issue before this Court in the *Reynolds* case was whether the judge or jury in a condemnation case determines the scope of the public project.

In determining that the scope of the project is a question which must be determined by the trial judge, the Court equated the Fifth Amendment's mandate of just compensation with "the fair market value of the property" and held that *this* is the precise issue for jury determination. *United States v. Reynolds, supra,* 16 and 20, citing *City of New York v. Sage,* 239 U.S. 57, 61 (1915); *Boom Co. v. Patterson,* 98 U.S. (8 Otto) 403, 408 (1879). Other refinements or elements of just compensation are for the trial judge. *United States v. Reynolds, supra,* 16 and 20. In the instant case the respective roles of judge and jury as set forth in *Reynolds* were followed in the trial court. The issue of the "fair market value" of the property being condemned was submitted to the jury; other issues of fact were submitted to the trial judge.[2] This conforms with the traditional judicial procedure of assessing interest and expenses after the jury verdict.

Arguably this case is distinguishable from *Reynolds* in that the precise issue before the Court in the later case concerned the scope of the public project and the instant case is concerned with other refinements or elements of just compensation, specifically, the proper rate of interest on the judgment award and reimbursement of reasonable litigation expenses. If these issues are not within the mandate of the *Reynolds* case, then they are important questions of

[2]The issue of the size (acres) and dimensions of the subject property was also submitted to the jury. The jury, however, did not return a separate verdict on this issue but merely considered it in conjunction with other evidence going to the fair market value of the property.

Federal law which have never been decided by this Court.

Thus, since the Court of Appeals applied the wrong standard and has thereby precluded Drake's Beach Estates from recovering certain elements of just compensation, this Court should grant certiorari to correct this error and more clearly define the role of judge and jury in condemnation cases.

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## II

**THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT IN PRECLUDING RECOVERY OF CERTAIN ELEMENTS OF JUST COMPENSATION BECAUSE OF THE OWNER'S FAILURE TO SUBMIT EVIDENCE OF THESE ELEMENTS TO THE JURY.**

In *United States v. Lee,* 360 F. 2d 449 (1966) the Court of Appeals for the Fifth Circuit upheld an award of litigation expenses in a condemnation case in which such expenses were submitted to the court after the question of the fair market value of the property being condemned was submitted to the jury. In this case Drake's Beach Estates, mindful of *United States v. Lee, supra,* submitted evidence of certain elements of just compensation to the Court following trial by jury of the issue of the fair market value of the property. Although the procedure pursued by Drake's Beach Estates was not questioned in the trial court or on appeal by the parties, the Court of Appeals for the Ninth Circuit precluded recovery of these items on the basis that Drake's Beach

Estates had failed to timely present its evidence to the jury.[3]

This conflict justifies the granting of a writ of certiorari to review the judgment below and enter an opinion for the guidance of trial judges and parties involved in condemnation suits so that elements of just compensation may be timely submitted to the appropriate trier of fact.

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[3]The opinion of the Court of Appeals for the Ninth Circuit fails to acknowledge facts in this case which support Drake's Beach Estates' position that it timely submitted evidence of the prevailing rate of interest and reimbursement of reasonable litigation expenses. The opinion of the Court of Appeals ignores the fact that reasonable litigation expenses were claimed in the notice of appearance and answer filed by Drake's Beach Estates on December 18, 1963. Following trial of the title phase, Drake's Beach Estates on December 1, 1967, filed a pretrial statement setting forth its claim for interest above the statutory rate and recovery of reasonable appraisal and engineering fees and expenses. In the Government's pretrial statement of December 4, 1967, it demanded a jury to determine the issue of "fair market value". The only issues submitted to the jury for its determination were the fair market value of the land being acquired and the sizes (acres) and dimensions of the property. At all times the Court and the Government were fully apprised of Drake's Beach Estates claim for interest in excess of the statutory rate and reimbursement of reasonable litigation expenses. At no time did the Government take the position that these issues should be submitted to the jury.

## III

**THE DECISION BELOW CONFLICTS WITH A DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN HOLDING THAT REASONABLE LITIGATION EXPENSES ARE NOT RECOVERABLE AS PART OF JUST COMPENSATION IN A CASE IN WHICH THE GOVERNMENT DISPUTES THE DEFENDANT OWNER'S RIGHT, TITLE AND INTEREST IN THE PROPERTY BEING ACQUIRED.**

Although not relying primarily upon this Court's opinion in *Dohany v. Rogers,* 281 U.S. 362 (1930), the Ninth Circuit's opinion in this case does state that the question of reimbursement of reasonable litigation expenses has been resolved against the property owner by the *Dohany* case.

The *Dohany* case did not involve a situation in which the burden of proving ownership or title was thrust upon the defendant owner and therefore is not applicable to the facts involved in the instant case.

Drake's Beach Estates is in no different position from the owner in *United States v. Lee,* 360 F. 2d 449 (1966), a case in which the Fifth Circuit permitted recovery of certain litigation expenses incurred by an owner in proving the extent of his ownership of property being condemned by the Government.[4] Specifically, in the *Lee* case the government alleged in its complaint that the Lee ownership was comprised of less acres than claimed by Mr. Lee. Thus the burden of proving ownership was placed upon

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[4] *United States v. Lee, supra,* in this respect has been cited with approval in *Henning v. Lake Charles Harbor and Terminal District,* 387 F. 2d 264, 267 (1968) aff'd following remand 409 F. 2d 932, 937 (1969), and *United States v. 818.76 Acres of Land, More or Less, Situated in Cedar and Dade Counties, State of Missouri,* 315 F. Supp. 758 (W.D. Mo. 1970).

the owner in the *Lee* case. The Fifth Circuit reasoned that since an owner cannot be deprived of property without due process of law, the owner in the *Lee* case could not be denied compensation for the cost of surveying and thereby proving the extent of his title in the land being taken by the Government.

The instant case is no different from the *Lee* case. The government disputed Drake's Beach Estates' ownership and refused to pay compensation for Drake's Beach Estates property until it established its title. This burden was successfully carried by Drake's Beach Estates at great expense. The mandate of the Fifth Amendment requires indemnification or full compensation so an owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken. (*United States v. Miller,* 317 U.S. 369, 373 (1943); *Seaboard Air Lines Ry. Co. v. United States,* 261 U.S. 299, 304 (1923); *United States v. New River Collieries Co.,* 262 U.S. 341, 343 (1923); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 326 (1893)). Thus the opinion of the Court in *United States v. Lee, supra,* is based on sound equitable and constitutional principles. Just compensation (fair market value) less litigation expenses is no longer just compensation. Reasonable litigation expenses should be reimbursed so that the public as a whole bears the expense of the public project and not merely the owner whose property happens to be needed for the project. *The National Board of Young Men's Christian Associations v. United States,* 395 U.S. 85, 89 (1969).

## CONCLUSION

For the reasons stated a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Burlingame, California,
March 2, 1973.

Respectfully submitted,
JESS S. JACKSON, JR.,
RONALD J. MULCARE,
*Attorneys for Petitioner.*

**(Appendices Follow)**

## Appendix A

In the United States District Court
in and for the Northern District of California
Southern Division

Civil No. 41861

United States of America, Plaintiff,

vs.

100 Acres of Land, more or less, in Marin County, State of California, Drake's Beach Estates, Inc., a corporation, etc., et al., Defendants.

[Filed May 7, 1970]

### JUDGMENT

The above-entitled action as to the issue of title came on regularly for trial on October 18, 1965, before the Court, the Honorable Lloyd H. Burke sitting without a jury. The Court heard the testimony and examined the proofs offered by the respective parties. The cause having been submitted for decision, and the Court having been fully advised in the premises on June 29, 1966, rendered its decision as to title and awarded the same to defendant, Drake's Beach Estates, Inc.

In the trial of the cause as to title, there appeared as counsel for plaintiff Assistant United States Attor-

ney Rodney H. Hamblin, and there appeared as counsel for defendant, Drake's Beach Estates, Inc., Landels, Ripley, Gregory and Diamond by Edward D. Landels and Jackson and Adams by Jess S. Jackson, Jr.

As to the issue of valuation, the above-entitled action came on for trial on September 8, 1969, the Honorable Lloyd H. Burke presiding before a jury empaneled and sworn for the determination of just compensation to be paid for the taking of the estate and interest in the property hereinafter described.

In the trial of the cause to determine just compensation there appeared as counsel for plaintiff Assistant United States Attorney Rodney H. Hamblin, and there appeared as counsel for defendants Jess S. Jackson, Jr., and Robert S. Webber.

In the jury trial to determine just compensation only the defendant Drake's Beach Estates, Inc., appeared and no other person or entity appeared in Court to claim an interest in or to the compensation payable for the property taken.

After hearing the evidence, both oral and documentary, the arguments of counsel, and upon being fully instructed by the Court, the jury retired to consider its verdict, and on November 28, 1969, returned the following verdict:

> "We, the jury, find that just compensation for the land condemned on October 23, 1963, is: $700,000.00.
>
> /s/ Miss Marcelle Bailey
>
> Foreman

Predicated upon the pleadings and documents on file in this action, the evidence introduced at the trials, and the verdict of the jury, the Court is now fully informed and finds and concludes as follows:

## COURT TRIAL AS TO TITLE

### *Findings of Fact*

It is true that:

1. The property being taken in this action and title to which is determined herein is described in plaintiff's complaint and declaration of taking.

2. Pursuant to the Act of March 3, 1851 (9 Stat. 631), the United States of America issued a patent to Andrew Randall, dated June 4, 1860, known as Rancho Punta de los Reyes Sobrante.

3. Defendant, Drake's Beach Estates, Inc., at the date of the commencement of this action was the successor in interest of Andrew Randall and by mesne conveyances had acquired all title and interest in the land granted to Andrew Randall by the United States.

4. In the patent issued to Andrew Randall the courses, distances and angles of the traverse lines of the perimeter description on the north, west and south of the land patented meandered the shores of Tomales Bay, the Pacific Ocean, Drake's Bay and Limantour Bay.

5. The shores of Tomales Bay, the Pacific Ocean, Drake's Bay, Limantour Bay and the Pacific Ocean, respectively constituted the northerly, westerly and southerly boundaries of the property patented to

Andrew Randall and included within said boundaries was all of Limantour Spit to ordinary high tide.

6. The pertinent portion of the description in the patent which designates the northwesterly end of Limantour Spit, called Station 415, and which reads "S 17-1/2° W 4.50 (chains)" is consistent with and does not conflict with the subsequent call "to the mouth of Limantour Bay."

7. The call to the "mouth of Limantour Bay" which follows the bearing and distance at Station 415 in the patent pertains to the width of Limantour Spit, and not to its length, and the term "mouth," as utilized in the patent description, was not employed by the deputy surveyor to designate "main entrance."

8. The patent, plat and field notes of the deputy surveyor establish that approximately 1-1/3 miles of irregular sandspit, situate northwesterly of the lowest channel at the 415 Line, was not surveyed nor included in the patent, and the water's edge at mean high water as found by the surveyor was in the secondary channel area in the vicinity of the 415 Line.

9. The traverse line numbered 415 of the field notes of the survey from which the perimeter description in the patent was prepared reads, "S. 17-1/2° W. 4.50 to the mouth of Limanton's bay" (correctly spelled Limantour Bay in the patent). Said course "S. 17-1/2° W." did not accurately depict the shore line of Limantour Bay or of the Pacific Ocean at the date of the survey or of the patent. Said Course "S 17-1/2° W." and said distance "4.50" chains did

accurately extend to the monument called for, namely, the Mouth of Limantour Bay. Said traverse line from Station 415 to Station 416 of the survey was a meander line purporting to meander the shore line or line of ordinary high tide of Limantour Bay and the Pacific Ocean.

10. The ordinary high tide lines of Limantour Bay and the Pacific Ocean as they existed at the time of the survey and patent forming the boundaries of Limantour Spit are depicted on the U. S. Coast Survey Map between Duxbury Reef and Rancho Punta de los Reyes, 1859-60, register 805 (Plaintiff's Exhibit 28) and on U. S. Coast Survey Map entitled, "Preliminary Chart of Drake's Bay, California" dated 1860 (Plaintiff's Exhibit 29), and at the time of the survey and patent Limantour Spit extended above ordinary high tide for approximately one and one-third miles westerly of the traverse line between Stations 415 and 416 as said line is shown by said survey.

11. The location of the mouth of Limantour Bay at the time of the survey and patent is depicted on said U. S. Coast Survey Map dated 1859-60 (Plaintiff's Exhibit 28) and on said "Preliminary Chart of Drake's Bay" dated 1850 (Plaintiff's Exhibit 29) and was in fact approximately one and one-third miles westerly of the traverse line between stations number 415 and 416 in the survey and lay opposite the middle bluff of Drake's Head.

12. There is no evidence that at the time of the survey or patent islands of land surrounded by water

at mean high tide existed in the area of Limantour Spit or that a channel of water at mean high tide existed at or near the traverse line between stations numbered 415 and 416 on the survey.

13. At the time of the issuance of the patent to Andrew Randall, Limantour Spit, of which the property involved in this action was a part, was a long narrow peninsula extending westerly from the upland and lying above mean high tide for its entire length.

14. It was the intention of the United States in issuing the patent to Andrew Randall to grant all of the lands previously granted to Osio by the Mexican government and to grant to Andrew Randall as part of the property conveyed all of Limantour Spit, including the property involved in this proceeding.

15. Since the date of the patent the Spit has been extended westerly for a distance of about one-half a mile as the result of natural accretion. Such changes as have occurred in the area of the Spit lying above mean high tide since the date of the patent have been the result of natural erosion or accretion.

16. By stipulation of the parties entered into at the trial as to the issue of title the parcel sought to be taken and condemned by plaintiff in this action is accurately described as of the date of commencement of this action as all that real property shown on Plaintiff's Exhibit 66, commencing from the most westerly boundary of the recorded subdivisions known as Drake's Bay Unit No. 1 and Drake's Bay Unit No. 3, Marin County, California, and extending west-

erly to include all of that land contained within the contour line at mean high tide on Plaintiff's Exhibit 66.

Thereafter, on April 29, 1969, upon the motion of defendant, Drake's Beach Estates, Inc., for an order relieving defendant from any and all stipulations, findings, conclusions and judgments or orders relating to size of the property condemned or the accuracy of any documents purporting to represent the size or dimensions of the property, the Court, the Honorable Lloyd H. Burke sitting without a jury, having heard the testimony and having examined the proof offered by the defendant and the declaration filed by respective counsel, and having considered the points and authorities submitted by the respective parties, including the oral summation thereof, and the Court having fully advised in the premises, made the following order:

(a) It Is Hereby Ordered that defendant, Drake's Beach Estates, Inc., is hereby relieved from any and all stipulations, findings, conclusions and orders based on any evidence or stipulations relating to the size and dimensions of that portion of Limantour Spit which is the subject property being condemned herein and is relieved of any stipulations, findings, conclusions or orders relating to the accuracy of any documents, including Plaintiff's Exhibit 66, purporting to represent the size and dimensions of said subject property.

(b) It Is Further Ordered that the Court's Findings of Fact, Conclusions of Law and Judgment signed by this Court dated June 29, 1966, and filed

June 29, 1966, shall be amended, and modified by deleting therefrom, Finding of Fact No. 16 which commences on line 31, page 4 through line 7 page 5 thereof.

(c) It Is Further Ordered that the determination of dimensions and area of the subject property are to be determined in the valuation phase of this case.

17. On January 29, 1964, defendant State of California filed its disclaimer of interest herein; on April 29, 1965, Marin County filed its disclaimer of interest herein.

*Conclusions of Law*

The following conclusions of law, insofar as they may be considered findings of fact, are found by this Court to be true in all respects.

From the foregoing facts, the Court concludes:

1. That the northerly, westerly and southerly boundaries of the land patent to Andrew Randall consisted of the shore line at mean high tide of Tomales Bay, of the Pacific Ocean, of Drake's Bay and of Limantour Bay as it then existed.

2. That the perimeter description in the patent issued to Andrew Randall by courses, distances and angles from the point on Tomales Bay marked Station 3 on the plat attached to the patent to the point on the Pacific Ocean marked Station 444 on the plat was a meander line intended to meander the shore lines at mean high tide of Tomales Bay, the Pacific Ocean (between Tomales Bay and Drake's Bay),

Drake's Bay, Limantour Bay and the Pacific Ocean (south of Limantour Bay), and that the traverse line between Stations 415 and 416 was part of said meander line.

3. That the call in the patent which in the field notes is described as course 415, reading "to the mouth of Limantour Bay," controls over the course reading "S. 17½° W."

4. That the patent issued to Andrew Randall granted to the patentee all of Limantour Spit of which the land involved in this action is a part and that defendant, Drake's Beach Estates, Inc., is the successor in interest thereto by mesne conveyance of Andrew Randall.

5. That any increase occurring since the date of the patent in the area of the Spit lying above mean high tide to the date of the filing of this action belonged to the owners of the upland at the date of the commencement of this action, to wit, Drake's Beach Estates, Inc.

6. That at the date of the commencement of this action, Drake's Beach Estates, Inc. was the owner of all of the land sought to be condemned in this action as described in the complaint and declaration of taking of plaintiff on file herein, and the United States of America at the time of the commencement of this action had no right, title or interest therein.

*Judgment*

In accordance with the foregoing findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed:

That defendant, Drake's Beach Estates, Inc., is the owner of all of that certain real property located in Marin County, California, consisting of all that portion of Limantour Spit lying above mean high tide at the time of the commencement of this action and as described in plaintiff's complaint and declaration of taking on file herein, and that no other person or entity, including the United States and the State of California, at the date of the commencement of this action had any right, title or interest therein.

## *JURY TRIAL AS TO JUST COMPENSATION*

*Findings of Fact and Conclusions of Law*

1. That the Complaint and Declaration of Taking in this case were filed on October 23, 1963, and concurrently with said filing the sum of One Dollar ($1.00) was deposited in the Registry of the Court.

2. That pursuant to written agreement entered into between the defendant, Drake's Beach Estates, Inc., signed July 20, 1963, and the plaintiff, acting by and through the National Park Service, signed on September 3, 1963, by Ben H. Thompson, Assistant Director, N.P.S., a copy of said agreement filed in this action as Defendant's Exhibit No. 67, the sum of One Dollar ($1.00) was deposited in the Registry of the Court with the filing of the Declaration of Taking, and inter-

est on the judgment is waived by defendant until August 31, 1965.

3. That the use for which the property described in plaintiff's complaint and declaration of taking on file herein has been taken and condemned by the plaintiff is one authorized by law, and the said property and the taking thereof are necessary and suited to said use.

4. That all parties interested directly or indirectly in said property have been personally served with process or have appeared in said action; that said property, together with all claimants and parties interested therein, are within the jurisdiction of this Court which has power and authority to enter this judgment.

5. That the land for which just compensation was determined by the verdict of the jury and for which just compensation is being determined pursuant to this judgment consists of all that portion of Limantour Spit situated in Marin County, California, northwesterly of and adjoining the subdivisions known as Drake's Bay Unit No. 3, recorded in Book 11 of Maps, page 79, and Drake's Bay Unit No. 1, recorded in Book 10 of Maps, page 108, Marin County, California, which property is bordered by the mean high water line of Estero de Limantour, Drake's Estero and Drake's Bay.

6. That the estate in the land condemned by plaintiff, as described in its complaint and declaration of taking on file herein, is the fee simple title thereto.

7. Pursuant to the verdict of the jury, the fair market value of the land described in Finding No. 5 above is the sum of Seven Hundred Thousand Dollars ($700,000.00).

In accordance with the foregoing Findings of Fact and Conclusions of Law:

I

It Is Ordered, Adjudged and Decreed that title to the estate and interest condemned in this proceeding as described in plaintiff's complaint and declaration of taking on file herein vested in the United States of America, free and discharged of all claims and liens of any kind whatsoever, upon the date of the filing of the Declaration of Taking and the depositing of the sum aforesaid, and that said estate and interest condemned are taken for the public use of the United States of America as authorized by law.

II

It Is Further Ordered, Adjudged and Decreed that the sum of Seven Hundred Thousand and No/100 Dollars ($700,000.00) be and it is hereby awarded as the full, adequate and just compensation for the taking of all that portion of Limantour Spit situated in Marin County, California, northwesterly of and adjoining the subdivisions known as Drake's Bay Unit No. 3, recorded in Book 11 of Maps, page 79, and Drake's Bay Unit No. 1, recorded in Book 10 of Maps, page 108, Marin County, California which property is bordered by the mean high water line of Es-

tero de Limantour, Drake's Estero and Drake's Bay; and it appearing that the sum of One Dollar ($1.00), being the amount on deposit in the Registry of the Court for the taking of said land, has not been withdrawn by defendant, the plaintiff, United States of America, is hereby directed to deposit the balance to be deposited pursuant to the verdict of the jury and this judgment, that is, the sum of Six Hundred Ninety-Nine Thousand Nine Hundred and Ninety-Nine Dollars ($699,999.00), together with interest thereon at the rate of six percent (6%) per annum, from September 1, 1965, until the deposit of such deficiency, with interest as aforesaid, into the Registry of the Court; and the Clerk of the above-named Court is hereby directed to pay the sum of Seven Hundred Thousand and No/100 Dollars ($700,000.00), the amount of the award as aforesaid, with interest as aforesaid, to defendant, Drake's Beach Estates, Inc., forthwith upon deposit by plaintiff into the Registry of the Court of the sum of Six Hundred Ninety-Nine Thousand Nine Hundred Ninety-Nine and No/100 Dollars ($699,999.00) with interest as aforesaid.

Dated: May 6, 1970

Lloyd H. Burke
/s/ Lloyd H. Burke
United States Judge
Northern District of California

## Appendix B

United States Court of Appeals
for the Ninth Circuit

Nos. 26,483 and 26,531

United States of America,
Appellant, Cross-Appellee,

vs.

100 Acres of Land, more or less, in Marin County, State of California, Drake's Beach Estates, Inc., a corporation, et al.,
Appellees, Cross-Appellants.

[September 25, 1972]

Appeals from the United States District Court
for the Northern District of California

Before: BROWNING and WRIGHT, Circuit Judges, and TAYLOR*, District Judge.

TAYLOR, District Judge:

This is a condemnation action involving a small peninsula of sandy real estate on the coast of Marin County, California, commonly known as Limantour

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

Spit, some 45 miles north of the city of San Francisco on the Pacific Coast. Appellee (Drake's Beach) claims title through a patent of the United States to Andrew Randall issued June 4, 1860. The Government contends that the land in question was not included in the patent. These proceedings had their inception when the United States purchased from Drake's Beach some 850 acres adjacent to this parcel of land for the Point Reyes National Seashore Project. As a part of that purchase agreement the United States agreed to institute this condemnation proceeding against the parcel in question which the United States claimed it owned. Pursuant to the condemnation proceedings, the parcel of land was taken by the Government on October 23, 1963.

The trial of the issues was bifurcated, the issue as to title was tried to the court, without a jury, and subsequent to the court's finding title in Drake's Beach, the issue of just compensation for the taking was tried to the court and a jury which lasted about 12 weeks. The jury returned a verdict for $700,000 as the just compensation which was considerably more than the Government's evidence of value and substantially less than what Drake's Beach contended it should have as just compensation.

The final judgment was entered on May 7, 1970, from which the Government appealed and Drake's Beach cross-appealed. The principal issues presented by the Government on its appeal relate to the question of title to the property being condemned and the admissibility of the evidence introduced on behalf of

Drake's Beach in determining market value of the property taken. The issues raised by Drake's Beach by its cross-appeal relate to the denial of its motion for interest at the prevailing rate rather than the 6% awarded in the judgment; the denial of Drake's Beach's motion for just compensation to include expenses and disbursements necessarily incurred in defending its title, surveying and determining the size and dimensions of the land taken and establishing value; and the refusal of the trial court to promptly order an increase of the deposit from $1.00 to the amount of the judgment plus interest.

We shall first consider the issue raised in regard to title and ownership of the property condemned.

The Government concedes that Drake's Beach is the successor in interest of the patentee, Andrew Randall, and that the shore line (mean high tide line) of Tomales Bay, the Pacific Ocean and Limantour Bay constituted the northerly and westerly boundaries of the land patented. The patent was issued pursuant to a decree confirming a Mexican grant to one Antonio Maria Osio. This decree is incorporated in the patent and recites that the land title is the same as that formerly granted to Osio and is bounded on one side by the Estero of Tomales, on two sides by the Pacific Ocean, and on the fourth side by land known as the Ranches of James Richard Perry and Rafel Garcia.

Following the decree of confirmation on December 28, 1857, a survey was made of the land confirmed. The surveyor ran a meander line along the shores of Tomales Bay, Limantour Bay and the Pacific Ocean.

A description of the land in accordance with this survey is included in the patent and a plat thereof attached to the patent. When the surveyor reached a point part way up the Limantour Bay side of the Spit, he made a traverse "S.17-½° W. 4.50 to the mouth of Limantour's Bay. Thence along the rocky coast of the Pacific Ocean". This line has been referred to in these proceedings as "the 415 line". The effect of this course No. 415 was that the balance of the Spit lay outside the traverse lines constituting the courses and distances of the meander line and this is what gave rise to this controversy.

On this appeal the Government concedes that the lines drawn by the surveyor were meander lines along the shores of Limantour Bay and the Pacific Ocean and that under well established principles, the actual shore line and not the traverse lines of the survey constitutes the boundary of the land patented.[1] *Hardin*

[1]The Government says "It is undisputed that the actual mean high tide line is the boundary if there were a difference between the survey meander line and the actual mean high tide line". At the same time, however, the Government cites certain cases for the rule than an erroneous meander line is effective to limit the scope of the land granted. The cases in this area were dispositively reviewed by the Supreme Court in *Producer's Oil Co. v. Hanzen*, 238 U.S. 325 (1915) (see authorities collected, *id.* at 338-39). The Court held that its prior cases established that a meander line does not delimit a grant where the land is bordered by water *unless* special evidence is presented to show an intent to use the meander line as a boundary of the patented land. *Id.* at 339. Accord, *Thomas R. Bishop Co. v. Santa Barbara County*, 96 F.2d 198, 202 (9th Cir. 1938), cert. denied 305 U.S. 623 (1938). Both *Horne v. Smith*, 159 U.S. 40 (1895) and *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), cited by the Government, are "special facts" cases. See *Horne*, supra, 159 U.S. at 43-46 ("obvious" that survey not intended to cover the disputed parcel), and *Niles*, supra, 159 U.S. at 306-09 (meander line intended to serve as boundary line of fractional shares in the grant). The present case does not involve a special intent to limit the survey.

*v. Jordan,* 140 U.S. 371, 35 L.Ed. 423, 11 S.Ct. 808 (1891); *Thomas R. Bishop Co. v. Santa Barbara County,* 96 Fed. 2d 198 (9th Cir. 1938), cert. den. 305 U.S. 623 (1938).

The Government concedes that if the portion of the Spit in question was at the time of the survey and patent a continuation of the peninsula lying above mean tide, then Drake's Beach owns it, but if below mean high tide, then it was an island and not within the survey and patent.

In regard to the question of title to that portion of the Spit, the only issue to be resolved by this court is whether the findings of the trial court are supported by the evidence. The trial court found as follows:

> "10. The ordinary high tide lines of Limantour Bay and the Pacific Ocean as they existed at the time of the survey and patent forming the boundaries of Limantour Spit are depicted on the U.S. Coast Survey Map between Duxbury Reef and Rancho Punta de los Reyes, 1859-60, Register 805 (Plaintiff's Exhibit 28) and on U.S. Coast Survey Map entitled 'Preliminary Chart of Drake's Bay, California' dated 1860 (Plaintiff's Exhibit 29), and at the time of the survey and patent Limantour Spit extended above ordinary high tide for approximately one and one-third miles westerly of the traverse line between Stations 415 and 416 as said line is shown by said survey."
>
> "11. The location of the mouth of Limantour Bay at the time of the survey and patent is depicted on said U.S. Coast Survey Map dated 1859-60 (Plaintiff's Exhibit 28) and on said 'Prelim-

inary Chart of Drake's Bay' dated 1860 (Plaintiff's Exhibit 29) and was in fact approximately one and one-third miles westerly of the traverse line between stations number 415 and 416 in the survey and lay opposite the middle bluff of Drake's Head."

"12. There is no evidence that at the time of the survey or patent islands of land surrounded by water at mean high tide existed in the area of Limantour Spit or that a channel of water at mean high tide existed at or near the traverse line between stations numbered 415 and 416 on the survey."

"13. At the time of the issuance of the patent to Andrew Randall, Limantour Spit, of which the property involved in this action was a part, was a long narrow peninsula extending westerly from the upland and lying above mean high tide for its entire length."

In determining the question of title to the parcel of land in question, the crucial issue before the court is whether the low lying Limantour Spit was above the mean high tide line in 1858, the time of the survey on which the patent was based. It appears to be the Government's theory that in 1858, although Limantour Spit may have existed at low tide, it was only two islands at mean high tide and therefore the patent only granted to Randall the land to the seashore and the islands remained the property of the United States. Drake's Beach contends, and the trial court found, that the entire spit existed above the mean high tide line in 1858.

We have carefully considered the evidence in the record on which the respective parties rely, both documentary and otherwise, in regard to the title issue and believe there is ample evidence to support the findings and conclusions of the trial court on this issue. Certainly the findings and conclusions are not clearly erroneous.

Having resolved the question of title, we now turn to the evidentiary issues raised by the Government. The precise questions presented here are whether the trial court abused its discretion in allowing Drake's Beach to introduce evidence of lot sales and development costs in support of its "developer's residual approach" theory for the purpose of determining the fair market value of the property taken; and whether the court erred when it admitted evidence as to probabilities of integrated use of the condemned land with state-owned tidelands.

This court in *United States v. 55.22 Acres of Land, etc., Yakima Co., Wash.*, 411 F.2d 432, 434 (9th Cir. 1969) announced the rule in regard to the admissibility of evidence as follows:

> "The determination of that question [referring to the admissibility of evidence] calls for an exercise of a sound discretion by the trial court, and the ruling thereon is reviewable only for abuse of discretion."

In a condemnation proceeding, such as we have here, the desired result is to see that the landowner is put in as good a position pecuniarily as he would have occupied if his property had not been taken. *Seaboard*

*Airline Ry. Co. v. United States,* 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923). The Supreme Court of the United States has laid down broad guidelines for the purpose of achieving this desired result. In *United States v. Miller,* 317 U.S. 369, 373, 374, 63 S. Ct. 276, 87 L.Ed. 336 (1943), the Court stated:

> "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the . . . 'fair market value' of what is taken."

The three generally recognized approaches in ascertaining "fair market value" are: (1) Comparable sales; (2) the income or capitalization of income; and (3) the reproduction cost at the time of taking, less depreciation. See *United States v. Toronto, Hamilton and Buffalo Nav. Co.,* 338 U.S. 396, 402, 403, 70 S.Ct. 207, 94 L.Ed. 195 (1949).

Ordinarily, if there are sales of comparable property at or near the time the condemned property is taken, evidence in regard to such sales would be more appropriate than any other method in determining the market value of the property taken. However, if there are no comparable sales, then other methods must be resorted to in order to ascertain market value. In order for the sales of other property to be admissible and relevant, that property must be in fact com-

parable. See *Fairfield Gardens, Inc. v. United States*, 306 F.2d 167, 172 (9th Cir. 1962).

The land or sandspit, the subject of this action, was a portion of some 1000 acres of property owned by Drake's Beach. Easterly of the subject property was another 100 acres of the same sandspit which had been acquired by the Government as part of an earlier settlement. The property in question was part of a recreational and residential development in progress on the entire acreage. Development of the condemned property was imminent. Indeed, some preparatory physical work had already been completed.

At trial, Drake's Beach, through its expert appraiser witnesses, asserted that the highest and best use of the subject property was for subdividing into recreational beach lots, while the Government, through its appraisers, maintained that the highest and best use of the property was for recreational purposes only. It is not uncommon for expert witnesses to disagree in regard to the highest and best use to which condemned property may be put and as to values based on their respective opinions. Ultimately, this is a question to be decided by the trier of fact, in this case the jury from the evidence. It appears obvious that the jury in this case agreed with the landowner. It is basic, not disputed by the Government here, that in an eminent domain proceeding the landowner is entitled to a value based on the use to which the condemned property is being put or may be put in the reasonably near future. *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *Mc-*

*Candless v. United States*, 298 U.S. 342, 345, 56 S.Ct. 764, 80 L.Ed. 1205 (1936).

The expert witnesses for Drake's Beach testified as to the fair market value of the condemned property to be $1,600,000 and $1,995,000 and the Government's witnesses valued the land at $171,000 and $185,000. In arriving at their values, the owner's witnesses took into consideration the market data of sales of adjacent subdivided lots and made deductions for selling and advertising expenses, engineering and development costs, overhead costs, taxes, buyers' anticipated profits, and for acreage loss for streets, etc. in order to reflect or indicate the value of the property at the time of taking. In this case, the data relied on was derived from the market and facts as had been generated in the development of and adjacent land. This method is referred to as the "developer's residual approach."

The Government's values were based on what its witnesses considered comparable sales. The record does not show that the sales relied on were in fact comparable in regard to location, character and desirability for subdividing as recreational property. It is apparent that the jury was not impressed.

The Government strenuously objected to the owner's method of arriving at the fair market value of the condemned property and argues here that the trial court erred in admitting such evidence. It is claimed that the method is speculative in the extreme and has no relation to the market because it does not consider the seller or competing investment opportunities. We do not agree. The evidence admitted was based on

facts obtained as a result of the subdivision of which the condemned property was a part and partially under development at the time it was taken. Even though the subject property was largely unimproved, it was an integral part of a subdivision being developed and was the next unit to be completed. It did not exist as a separate parcel prior to the commencement of the condemnation action. The record clearly indicates that the subject property was unusual in character in that it was a sandspit surrounded on three sides by water and had good potential for development as beach homesites.

It is fundamental that Drake's Beach is entitled to just compensation for the subject property and this requires that it be placed in "as good a position pecuniarily" as it would have occupied if its property had not been taken. See *U.S. v. Miller,* supra; *Seaboard Airline Ry. Co. v. U.S.,* supra.

This court enunciated the rule in *U.S. v. 55.22 Acres,* supra, that various appraisal methods are admissible for determining just compensation or market value. All facts which would influence a person of ordinary prudence, desiring to purchase the property, are admissible. *Kimball Laundry Co. v. United States,* 338 U.S. 1, 16, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949). The modern trend favors a broad rule of admissibility, with discretion in the trial court. *United States v. 25.406 Acres of Land, et al.,* 172 F.2d 990, 993 (4th Cir. 1949), cert. denied 337 U.S. 931 (1949); and any evidence is admissible which might reasonably influence a willing seller and a willing buyer. *Wolff v.*

*Commonwealth of Puerto Rico*, 341 F.2d 945, 947, 948 (1st Cir. 1965).

It is fair to say that the valuation trial was unusual, not only as to the characteristics of the subject property, but also in regard to the volume of evidence produced and time consumed in presenting it to the jury. Each party was given every opportunity to present evidence on its theory as to value and to counter or refute the evidence and theory of the other. After carefully reviewing the record and prevailing authorities, we conclude that the trial court did not abuse its discretion in admitting the evidence of appellee, Drake's Beach, on the question of fair market value. The trial court correctly instructed the jury during the trial that the amount to be awarded was the fair market value of the property as it was on October 23, 1963, the date it was taken by the Government.

In performing this difficult task, the jury was entitled to and apparently did take into consideration all the evidence introduced by the respective parties in arriving at its verdict.

The remaining evidentiary question raised by the Government is that the trial court erred in permitting Drake's Beach to present testimony as to the reasonable probability that adjoining state-owned tidelands would have been available in connection with the development of the subject property. One probable use was to straighten the common boundary line and the other was to provide a source of land fill for the condemned property while dredging of the State's

channels for recreational boatways. At trial, the Government objected to the introduction of this evidence and to the court's charge permitting the approach.

Drake's Beach contends that this evidence of reasonable probabilities was admissible on several grounds: (1) Relevant to market value as a factor an informed buyer and seller would consider; (2) relevant to adaptability of the property to its highest and best use; and (3) relevant to the feasibility of such use. The Government argues that in a federal eminent domain proceeding, a condemnee cannot assume assemblage with lands of another sovereign whose policy parallels the federal one and prohibits the contemplated use. In this connection, the Government argues that the State lands were held for a purpose parallel to the federal purpose, which was a park to preserve its natural attributes; that the State lands were in or adjoined clam and oyster preserves and therefore involved State policy on ecology; and that the State fully supported the federal purpose and had objected in the past to just the kind of use proposed for these particular State holdings because such use would adversely affect the ecology of the clams and oysters.

It appears to be well settled that in determining market value of condemned property, evidence as to the reasonable probabilities of its use is admissible and may be considered. See *McCandless v. U.S.*, supra; *United States v. Waterhouse*, 132 F.2d 699 (9th Cir. 1943), aff'd. 321 U.S. 743, 64 S.Ct. 484, 88 L.Ed. 1047 (1944). The weight to be given evidence of reasonable probability is a question for the trier

of fact. Cf. *Olson v. U.S.*, supra. Evidence in regard to prospective uses is admissible and whether adaptability and probability affect market value is for the jury. *U.S. v. Waterhouse*, supra.

The argument of the Government on this question seems to be based on what the State's policy was subsequent to the initiation of the Government's project, while the evidence was introduced to show probabilities that may have been prior thereto. It is fundamental that the effects of a project, which requires the taking of property, must be disregarded in determining the fair market value of the property prior to the taking. See *Olson v. United States*, supra; *New York v. Sage*, 239 U.S. 57, 36 S.Ct. 25, 60 L.Ed. 43 (1915). This evidence was introduced by Drake's Beach through witnesses who expressed their opinion and the facts and reasons on which such opinions were based. The Government had ample opportunity to cross-examine these witnesses and to discredit or contradict the testimony of Mr. Mady and others. The trial court, in its discretion, properly decided the witnesses were competent to testify and apparently found that a sufficient foundation had been shown for such testimony. The weight to be given such opinion evidence in the circumstances was for the jury.

The competency of an expert witness is a matter for the trial judge in the exercise of discretion. In *St. Joe Paper Co. v. United States*, 155 F.2d 93 (5th Cir. 1946), at page 96, the court stated:

> "The qualifications required of an expert before he may give an opinion is a question for the trial

judge and his decision thereon is conclusive, unless clearly erroneous as a matter of law."

We conclude that the admission by the trial court of the evidence complained of by the Government does not constitute reversible error.

## CROSS-APPEAL

On November 28, 1969, the jury rendered its verdict in favor of Drake's Beach for the sum of $700,000 as the just compensation for the condemned land. Thereafter, Drake's Beach moved the trial court to award interest at the prevailing economic rate; for additional compensation by way of litigation expenses and disbursements in excess of $150,501.88; and to increase the security deposit and for payment of the same. The motions were denied and Drake's Beach cross-appealed, limiting its appeal to the denial of its motions.

Drake's Beach contends that the Fifth Amendment to the Constitution and the decisions of the Supreme Court of the United States require that the landowner in a federal eminent domain proceeding be fully compensated for his losses and that an additional element of his loss is the right to a reasonable rate of interest for the delay in payment. Drake's Beach argues that the allowance of six percent interest, as authorized by 40 U.S.C. §258a and as provided in the judgment, is not a reasonable rate of interest because it was not the current prevailing economic rate and therefore would not fully compensate Drake's Beach for its loss.

The question of a rate of interest higher than the six percent authorized by 40 U.S.C. §258a was initially raised by Drake's Beach in the form of a lodged Judgment, requesting that the interest be computed at the prevailing economic rate. The Government opposed awarding interest at a rate in excess of that provided by statute. The trial court denied the motion of Drake's Beach as to interest, but stated that it would have provided a rate of seven percent but for the statute requiring six percent.

In *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327, 13 S.Ct. 622, 37 L.Ed. 463 (1893), it is clearly stated that the determination of just compensation is a judicial question:

> ". . . this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

*United States v. Miller,* supra, teaches that a landowner is to be made whole for his losses resulting from the government's taking of his property. In *Seaboard Airline Ry. Co. v. United States,* supra, the Supreme Court stated at page 306:

> "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. *Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.*" [emphasis added]

It is evident from the language used in 40 U.S.C. §258a that interest is intended to be a part of just compensation:

> ". . . said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the *said judgment shall include, as a part of the just compensation awarded, interest* at the rate of 6 per centum per annum . . ." [emphasis added]

This court is of the opinion that interest, at a proper and reasonable rate, is an element of the just compensation to be determined in the judicial process. Since we believe interest is an element of just compensation, we must consider whether interest is a question of law to be decided by the court, or if it is a question of fact to be determined by the trier of fact. In a complex capitalist society such as ours, a determination as to what is a proper rate of interest has many variables

based on economic and business considerations which may vary within each factual situation. It seems clear that a determination as to the proper rate of interest is a factual question and should be determined by the trier of fact.

The record in the present case conclusively shows that Drake's Beach did not attempt to introduce any evidence in regard to interest during the valuation trial. It was not until after the jury had found just compensation that Drake's Beach raised the issue of interest. In *Confederated Salish and Kootenai Tribes v. United States,* 437 F.2d 458 (1971), the United States Court of Claims was presented with a similar problem. The case was originally tried before a Commissioner and although the claim for a higher rate of interest was presented to the Commissioner, there was no attempt to present evidence in support of the claim until it was presented to the United States Court of Claims. The court, in discussing the question of interest, stated at page 460:

> "We think that an issue of this character should have been threshed out at the trial, where both sides could have introduced evidence (and possibly expert testimony, subject to cross-examination) and an adequate record made for the court's guidance . . ."

The quoted rationale is equally appropriate in the case here. In the above cited case, a commissioner made the determination of just compensation, while in this case the determination was made by the jury. Drake's Beach should have made the interest question an issue at trial instead of waiting until after the just

compensation question had been decided by the jury. Drake's Beach had its day in court to prove just compensation and to present all its evidence affecting that determination. It is not entitled to another trial to prove additional elements of just compensation which it could have presented during the original trial.

Drake's Beach further contends that the trial court should have also awarded, as just compensation, its expenses and disbursements incurred in this litigation. This question was also raised subsequent to the jury verdict. We believe this question was resolved in *Dohany v. Rogers*, 281 U.S. 362, 368, 50 S.Ct. 299, 74 L.Ed. 904 (1930), wherein it is stated:

> "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."

Without reliance on *Dohany*, we do not consider it necessary to discuss the merits of this contention since the record reveals that there was no attempt to present evidence to the jury in regard to litigation expenses. If, as Drake's Beach contends, litigation expenses are a part of the just compensation to be awarded, it follows that evidence in regard to such expenses should have been presented to the trier of fact.

The final question raised on this cross-appeal is now moot since this court has heretofore ordered the Government to make an adequate deposit and for the withdrawal of the same by Drake's Beach.

The judgment made and entered in this cause is AFFIRMED.

## Appendix C

United States Court of Appeals
For The Ninth Circuit

Nos. 26483 and 26531

United States of America,
Appellant, Cross-Appellee,

vs.

100 Acres of Land, More or Less, in Marin County, State of California, Drake's Beach Estates, Inc., a corporation, et al.,
Appellees, Cross-Appellants.

Appeal from the United States District Court
For The Northern District of California

### JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 25, 1972

## Appendix D

United States Court of Appeals
For The Ninth Circuit

No. 26,483
No. 26,531

United States of America,
Appellant-Cross-Appellee,

vs.

100 Acres of Land, More or Less, in Marin County, State of California, Drake's Beach Estates, Inc., a corporation, et al.,
Appellees-Cross-Appellants.

[Filed December 6, 1972]

### ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and TAYLOR,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated, December 6, 1972

*Honorable Fred M. Taylor, Senior Judge, United States District Court, District of Idaho, sitting by designation.

United States Court of Appeals
For The Ninth Circuit

No. 26,483
No. 26,531

United States of America,
Appellant-Cross-Appellee,

vs.

100 Acres of Land, More or Less, in Marin County, State of California, Drake's Beach Estates, Inc., a corporation, et al.,
Appellees-Cross-Appellants.

[Filed December 6, 1972]

ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and TAYLOR,* District Judge

The petition for rehearing filed on behalf of Drake's Beach Estates, Inc., is denied.

Dated, December 6, 1972

*Honorable Fred M. Taylor, Senior Judge, United States District Court, District of Idaho, sitting by designation.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-1201

100 ACRES OF LAND, MORE OR LESS,
IN MARIN COUNTY, STATE OF CALIFORNIA,
DRAKE'S BEACH ESTATES, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 468 F. 2d 1261.

### JURISDICTION

The judgment of the court of appeals was entered on September 25, 1972 (Pet. App. C). A timely petition for rehearing was denied on December 6, 1972 (Pet. App. D). The petition for a writ of certiorari was filed on March 3, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether an appropriate rate of interest was applied to the judgment in this condemnation case.

2. Whether attorneys' fees and costs should be awarded to a condemnee in a federal eminent domain proceeding.

## STATEMENT

The United States purchased 850 acres of land for the Point Reyes National Seashore in California from Drake's Beach Estates, Inc. As part of the settlement on that land, the United States brought condemnation proceedings against about 100 acres of adjacent land, title to which was in dispute.[1] In the resultant condemnation proceeding, the trial court sitting alone found that Drake's Beach had title to the 100 acres; a jury trial on the issue of valuation followed. After the valuation trial, the district court denied Drake's Beach's motions for interest on the compensation award at a rate in excess of the six percent provided by the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a, and for attorneys' fees and trial costs. The district court stated that it would have awarded interest at the rate of seven percent were it not for the statute. On Drake's Beach's appeal,[2] the court of appeals

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[1] The settlement, dated July 20, 1963, required the United States to file a declaration of taking of the 100 acres within four months. Drake's Beach agreed that, in the event it was determined that Drake's Beach had title to the 100 acres, it would waive payment of any compensation award for three years, and interest on any award would not begin accruing until August 31, 1965. The settlement did not specify the rate of interest to be applied after August 31, 1965, and did not provide for the payment of attorneys' fees or costs.

[2] The United States appealed on the title and valuation issues. We are filing a petition for a writ of certiorari to review the court of appeals' affirmance of the district court's decision on those issues.

affirmed. With respect to the rate of interest, the court held that the matter was a question of fact for the jury to decide and that Drake's Beach was foreclosed from seeking a higher rate since it had not presented any evidence on the issue to the jury.

## ARGUMENT

Although we believe the court of appeals erred in ruling that the jury, rather than the court, should determine what rate of interest should be applied to a condemnation award, it reached the right result in affirming the district court's award of six percent. Accordingly, review by this Court is unwarranted. This Court has stated that a jury in a federal eminent domain proceeding is to decide only the issue of valuation of the property taken. All other matters are for the district court alone to decide. *United States* v. *Reynolds*, 397 U.S. 14. Drake's Beach's claims at issue here were properly considered and rejected on the merits by the district court.

Interest is normally due in condemnation on the difference between the final award and the sum the government deposits in the registry of the court on filing its declaration of taking. The landowner is entitled to the monetary equivalent of his land at the time the land is taken, and the land is usually taken on the day the government's declaration is filed. *United States* v. *Miller*, 317 U.S. 369, 381. Interest is compensation for the time the United States has both the landowner's property and his money. *Kieselbach* v. *Commissioner*, 317 U.S. 399, 403-404. Drake's Beach contends that the statutory interest rate of six percent provided for by the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a, is not fully compensatory, since rates higher than six percent were being commercially charged at

the time its land was taken.[3] Reference to Standard and Poor's Trade and Security Statistics, however, shows that from 1965 through 1972 the United States on the average paid less than six percent on its commercial bonds. Accordingly, Drake's Beach was fully compensated by the six percent rate provided by the Declaration of Taking Act.

Unlike the payment of interest, there is no constitutional right to the payment of costs and attorneys' fees in condemnation proceedings. *Kieselbach* v. *Commissioner*, 317 U.S. 399, 404. The United States pays in condemnation only for what it takes. *United States* v. *Fuller*, 409 U.S. 488; *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-379. "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain." *Dohany* v. *Rogers*, 281 U.S. 362, 368. See also *Fleischmann Corp.* v. *Maier Brewing*, 386 U.S. 714, 717. And, as Chief Justice Marshall stated in *United States* v. *Barker*, 2 Wheat. 395: "The United States never pay costs." See also *United States* v. *Knowles' Estate*, 58 F. 2d 718, 719 (C.A. 9). There is no statute waiving that proposition in this case. The district court thus did not err in refusing to award costs and attorneys' fees.

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[3] The land at issue was taken in 1963. In 1972, the United States deposited with the court a sum equal to the judgment plus six percent interest. The interest payments at issue relate only to the period after August 31, 1965. See note 1, *supra*.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1973.

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JUN 14 1973

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1972

## No. 72-1201

100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., a corporation, *Petitioner,*

VS.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR DRAKE'S BEACH ESTATES, INC. IN REPLY

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# In the Supreme Court
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100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., a corporation, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR DRAKE'S BEACH ESTATES, INC. IN REPLY

### QUESTIONS PRESENTED

According to the Brief for the United States in Opposition to this Petition for Certiorari, the questions presented are as follows:

1) Whether an appropriate rate of interest was applied to the judgment in this condemnation case.

2) Whether attorneys' fees and costs should be awarded to a condemnee in a federal eminent domain proceeding.

Since the questions presented as framed by the United States in its Brief in Opposition vary somewhat from the questions as framed by Petitioner, the following reasons for granting the writ are set forth for the Court's consideration.

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## REASONS FOR GRANTING WRIT

### I.

### LITIGATION EXPENSES

Never has this Court clearly had before it, as its primary issue, reimbursement of condemnation litigation expenses thrust upon a faultless owner of property taken by the "public" for a project. Lacking clear just and valid precedent, the issues of compensability of attorneys' fees and litigation expenses reappear again and again in the lower courts.

Simple justice and equity should prevent the public from forcing upon an individual owner more than his just share of the burden of government or of a specific public project. In the words of this Court, when an owner "surrenders to the public something more and different than that which is extracted from other members of the public, a full and just equivalent shall be returned to him."[1]

Pure logic tells us that "just compensation" less litigation expenses must equal something less than "just compensation."

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[1] *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

The intent of the Constitution to fully indemnify an owner has frequently been stated by this Court.[2]

**Dohany: Ill-considered and unjust**

Surprisingly then, only one Supreme Court case deals with this subject in an eminent domain context. *Dohany v. Rogers,* 281 U.S. 362 (1930) (itself primarily concerned with equal protection and relying upon an equal protection case for precedent) asserts that:

> "Attorneys fees and expenses are not embraced within just compensation for land taken by eminent domain. See *Joslin Manufacturing Co. v. City of Providence,* supra, 262 U.S. 675, 45 S.Ct. 684, 67 L. Ed. 1167. A state may allow the recovery of an attorney's fee in special classes of proceedings while withholding them in others." *Id.* at 368.

This single case stands alone in obvious philosophical conflict with the Constitution and those Supreme Court cases which require full reimbursement of an owner. Because of the rank injustice of the *Dohany* decision, it has spawned a plethora of cases in the lower courts. Repeatedly owners have sought justice, but have been denied relief from this harsh rule.

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[2] *Seaboard Airlines Ry. Co. v. U.S.*, 261 U.S. 299, 304 (1923), ". . . [T]he owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."; *U.S. v. New River Collieries Co.*, 262 U.S. 341, 343 (1923), "The owner was entitled . . . to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

**Sovereign Immunity and the Constitutional Mandate of Just Compensation**

In the face of the constitutional mandate of just compensation and the well-established policy of full indemnification to an owner by the public which should bear the burden of the cost of a public improvement, lower court decisions (and the government argument in its Brief in Opposition, page 4) try to embrace the doctrine of sovereign immunity to buttress the *Dohany* dicta. But the doctrine of sovereign immunity, itself archaic and obsolete, should not be applied in constitutional cases involving eminent domain and just compensation. How can our federal entity, which was created by the Constitution, seek immunity from a specific constitutional mandate to pay an owner just compensation?[3] Yet this fallacious reasoning persists in lower court decisions as a basis for denying an owner litigation expenses.[4]

Urged by the government, sovereign immunity, i.e., the absence of statute, was the trial court's basis for denial of this owner's request for litigation expenses as "just compensation" under the Constitution. As

---

[3]Many eminent domain cases rely on sovereign immunity precedent contained in non-eminent domain opinions to preclude recovery of litigation expenses by a condemnee. They base their logic as follows: "In the absence of a statute, directly and specifically so authorizing, costs and expenses cannot be assessed against the United States." See *U.S. v. Knowles' Estate*, 58 F.2d 718 (9th Cir. 1932); *U.S. v. Pressnell*, 328 F.2d 580 (6th Cir. 1964).

[4]Akin thereto are those cases turning on whether "conformity" statutes subject the United States to state statutes awarding costs. *Carlisle v. Cooper*, 64 F. 472 (denying costs); *U.S. v. Engeman*, 46 F. 898 (awarding costs). Occasionally, cases make no reference to sovereign immunity as such. However, they cite the absence of "statute" or "authority" authorizing taxing of costs

stated by the trial judge, "it appearing that no statutory authorities for the awarding of costs exist, the motion for costs is denied." (RT 5220, 5221). We respectfully urge the concept of sovereign immunity has no place in these enlightened times and certainly should not apply in eminent domain proceedings to frustrate the constitutional mandate of "just" compensation.

**Due Process**

Due process, too, requires reimbursement of an owner's litigation expenses in an eminent domain action. Just compensation is an essential element of due process of law with respect to the taking of private property for public use. *West v. Chesapeake & P. Tel. Co.*, 295 U.S. 622 (1935). Substance and not form alone can be the concern of due process. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). What protection is the due process clause if, while being awarded just compensation for the land, an owner is forced to expand a substantial proportion of his award to establish the award? The formality and orderly procedure of trial is worthless to an owner

against the United States in condemnation proceedings. *U.S. v. 125.71 acres*, 54 F. Supp. 193 (W.D. Pa. 1944); *In re Post Office*, 210 F. 832 (no statute); *U.S. v. Wade*, 40 F. 745 (no authority). Cases citing the absence of statute (thus invoking sovereign immunity) run afoul of the well-established principle that just compensation is a judicial question and does not rest with Congress. *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); *U.S. v. New River Collieries Co.*, 262 U.S. 341 (1923); *Phelps v. U.S.*, 274 U.S. 341, 343, 344 (1927); *Shoshone Tribe v. U.S.*, 299 U.S. 476, 497 (1936) (the presence or absence of a statute is immaterial); *U.S. v. Chicago, etc. R. Co.*, 282 U.S. 311 (1931) (an owner's right to compensation is absolute, and the government has no right to impose conditions or qualifications thereon, whether legislative or otherwise).

if the result is denial or substantial impairment of his fundamental right to just compensation. As expressed in *U.S. v. Lee,* 360 F.2d 449 (5th Cir. 1966), recovery of litigation expenses caused by the eminent domain action is required by due process.

**Enlightened Rule: Equitable Powers**

An enlightened rule would permit the trial court, as a judicial question, to determine whether, on the facts of a given case, equitable principles or the concept of just compensation should compel the court to reimburse to an owner (forced to litigate and who prevails) his reasonable litigation expenses by reason of condemnation proceedings. Cases such as *U.S. v. Lee, supra,* award litigation costs thrust upon an owner under the equitable powers of the trial court and pursuant to the Fifth Amendment (due process and just compensation). This rule is particularly needed, as in the instant case, where an owner is *forced* to litigate.[5]

**Coercion and Loss**

Under circumstances such as the instant case, an owner has two choices: he either incurs a severe eco-

[5]For example, in the instant case the government refused to make a clear offer, justifying the lack of an offer on the basis that it claimed ownership to the property. In a bifurcated trial on ownership, title eventually was held to be in this property owner, not the government. An offer of $100,000 was tardily made at the valuation phase (RT pre-trial conference Thursday, December 7, 1967, pages 64-70); it was compelled by the trial court. By comparison, the ultimate award was 7 times the initial "offer" (verdict, excluding interest and costs, was $700,000 (CT 472)). Significantly, the government's "offer" was even below its own testimony, ranging from $171,000 (RT 3556) to $265,000 (RT 3995).

nomic loss (gives the property to the public below its realistic value), or he expends substantial sums of money to protect his property interests. The effect is nothing less than economic coercion unless the government, which uses its powers to benefit the public and forces upon an individual owner a disproportionate share of the expense of the public project, is required to reimburse the owner for his losses.

This oppressive use of litigation must be restrained and equality of access to our courts encouraged. The philosophy of the *Lee* case if widely applied assures the availability of courts of justice for "faultless" owners who are required to litigate.

In *U.S. v. Lee, supra,* the owner was awarded as an element of just compensation certain survey costs and expenses related to his successful presentation of evidence resulting in a favorable determination of the size of his property.[6]

**A Growing Problem**

A growing number of Americans who live in urban ghettos, in suburbs along super highways, and on rural farms adjacent to reclamation, park and other "public projects" are having serious economic losses in the form of litigation expenses (or losses in negotiated settlements) thrust upon them by various public entities. The obvious effect of denial of recovery

[6]In the instant case, litigation expenses related to size and dimensions of the subject parcel exceeded $56,854.50, excluding attorneys' fees (CT 562). Litigation expenses relating to engineering costs, oceanographic fees and appraisal fees necessary to establish market value, highest and best use and related sub-issues exceeded $90,236.36 (CT 562).

of litigation expenses is to discourage owners from having their day in court when they honestly and reasonably differ with the entity's determination of fair market value. For many, the expenses imposed by condemnation proceedings often tip the balance away from economic independence and pride to dependence and indifference.

The government argues that our society is not fiscally strong enough to bear the burden of compensating those who disagree with our government, even those who prevail. Yet our society bears economic burdens far heavier and far less humanistic. Ownership of property and the family institution that it anchors lends stability to our society. Our system of law should induce, not devastate, ownership of property. Property often represents the product of lifelong labor. For our many elderly citizens, property is often the only measure of security they retain.

For the individual who sees large corporations litigate, but is unable to afford the expense of remedying an injustice to himself, not only is our society's promise of equal economic opportunities broken, but economic discrimination sponsored by this form of discriminatory law erodes the individual's faith in the fairness of our system of laws and judicial system. The promises of our Constitution remain unfulfilled. A government intent on meeting budget conscious goals is more and more tempted to misuse its power to coerce settlements.

Only this Court with a direct and well reasoned opinion can put to rest these cries of oppression and

injustice repeatedly urged upon lower courts. The volume of these instances will continue to increase unless an affirmative and clear cut decision is made on this issue.

We respectfully urge the only fair decision is to award litigation expenses in cases such as this, where litigation expenses have been thrust upon an owner, where the owner has prevailed, and where the owner has reasonably incurred expenses.

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## II.

### INTEREST

### Constitutional Right

As to interest, the government concedes that the owner's right to payment of interest is a constitutional right.[7] The government must concede this, for a condemnee's right to interest is well established.[8]

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[7]Brief in Opposition, page 4, "Unlike the payment of interest, there is no constitutional right to payment of costs and attorneys' fees in condemnation proceedings."

[8]Interest is an additional element of just compensation for delay. The Fifth Amendment of the Federal Constitution requires that when for any reason the payment of just compensation is postponed, the owner is entitled to an additional element of just compensation for this delay, *U.S. v. Rogers*, 255 U.S. 163 (1921); *Seaboard Airlines Ry. Co. v. United States*, 261 U.S. 299 (1923); *Brooks-Scanlon Corp. v. U.S.*, 265 U.S. 106 (1924); *Jacobs v. U.S.*, 290 U.S. 13, 17 (1933).

An owner's indemnity for his loss may be measured in various ways, depending upon the circumstances of each case. There is no set formula. *U.S. v. Miller*, 317 U.S. 369, 373, 374 (1943).

Interest is merely one measure, a "convenient way" to ascertain the just compensation for the owner's loss by reason of delay of payment. *Shoshone Tribe v. U.S.*, 299 U.S. 476 (1937); *U.S. v. Klamath and Modoc Tribes*, 304 U.S. 119 (1938); *Smyth v. U.S.*, 302 U.S. 329, 333 (1937).

**Error Conceded: Issue for Court**

The government also concedes error on the part of the Court of Appeals in ruling that the jury, rather than the court, should determine what rate of interest should be applied to a condemnation award.[9] The Ninth Circuit in this case has ruled that the issues of interest and attorneys' fees are for the jury and that evidence thereof must be presented during the case in chief. Citing *U.S. v. Reynolds,* 397 U.S. 14 (1970), the government concedes the Ninth Circuit erred.[10]

**Evidence was Timely Presented to Trial Judge**

Next, the government fails to reply to, and therefore, evidently concedes, the owner's position that it presented timely evidence to the trial judge. The government has always conceded it was timely; at least the government has never raised timeliness as an issue. It was the Court of Appeals which first raised the issues of timeliness.

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[9]If, as the government concedes, the issue of interest is for the trial judge, then the government has created error in opposing Drake's Beach Estates' motions and thus precluding the trial court from taking evidence on the issue of the rate of interest. In the government's pre-trial statement of December 4, 1967, the government itself demanded a jury to determine only the issue of "fair market value", obviously conceding that to be the limited and only issue to be before the jury.

[10]*U.S. v. Reynolds, supra,* holds that the issue of "scope of the project" is for the trial judge. Scope of the project obviously has some bearing upon highest and best use. Yet there is nothing in *Reynolds* which would require the issue of "highest and best use," traditionally treated as a jury issue, to be determined by the court. And issues of reasonable probability (i.e., zoning change, plottage to adjoining parcels) should likewise continue to be jury issues since *Reynolds* does not alter procedure for their treatment. The trial judge makes preliminary rulings on the admissibility of such evidence. The jury weighs it.

**Evidence Was Not Considered by Trial Judge**

The government next improperly argues that the trial court properly "considered and rejected" a rate of interest higher than the Declaration of Taking Act.[11] With all due respect, the Solicitor General did not attend the trial or read this record. This is a misrepresentation of the record and false. The Court did not consider and reject the issue of the rate of interest.[12] Rather it held itself bound to a statutory rate.

Thus the owner was denied an opportunity to present any evidence as to the appropriate rate of interest, proceed on its motions, and have the Court exercise its judicial function. This was a clear denial of due process of law and just compensation.[13]

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[11]Brief in Opposition, page 3, "Drake's Beach's claims at issue here were properly considered and rejected on the merits by the district court."

[12]The government's opposition was noted by the Court of Appeals, "the Government opposed awarding interest at a rate in excess of that provided by statute. The trial court denied the motion of Drake's Beach Estates as to interest, but stated that it would have provided a rate of seven percent but for the statute requiring six percent." Petition, App. B., page xxix. This owner does not disagree with the Court of Appeals opinion that "It seems clear that a determination as to the proper rate of interest is a factual question and should be determined by the trier of fact." Petition, App. B., page xxx. This owner does disagree with the Court of Appeals' conclusion that the *jury*, not the judge, should be the trier of that fact.

[13]The Court of Appeals cited *The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States*, 437 F.2d 458 (Ct. Cl. 1971), a Court of Claims case which rejected a claim never presented to the commissioner but first urged on review before the Court of Claims. That case is clearly distinguishable for, as the record below indicates, Drake's Beach Estates made every effort to present evidence on the rate of interest issue via its post-verdict motions to the *trial court*, not the reviewing body.

**Prejudice Clear**

The government finally argues that there was no prejudice by this error, i.e., that the trial court "reached the right result in affirming the District Court's award of 6%".[14] In support of this contention, the government urges that its own evidence, presented solely on appeal, i.e., the rate of interest paid by the government on commercial bonds for the period between 1965 through 1972,[15] shows no prejudice has occurred.

Again, the trial Court did not consider any evidence on this issue. Certainly it did not consider this evidence tardily offered by the government on appeal.

What the government may have gained or lost, or been unable to gain, is immaterial. The interest rate at which the government may or may not have been able to borrow, reflecting gain or loss to the condemnor, is irrelevant. It is loss to an owner, not gain to the condemnor, which is to be compensated.[16]

Loss to the owner is most fairly measured by what the government prevented the trial Court from considering, i.e., the interest rates lenders have exacted from an owner such as Drake's Beach Estates under the pertinent prevailing market conditions. The owner should receive full and perfect equivalent in

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[14]Brief in Opposition, page 3.

[15]Brief in Opposition, page 4, "Reference to Standard & Poor's Trade and Securities Statistics, however, shows that from 1965 through 1972 the U.S. on the average paid less than 6% on its commercial bonds."

[16]*U.S. v. Causby*, 328 U.S. 256 (1946); *Seaboard Airlines Ry. Co. v. United States*, 261 U.S. 299 (1923); *U. S. v. New River Collieries Co.*, 262 U.S. 341 (1923).

money for his loss. *U.S. v. Miller,* 317 U.S. 369 (1943); *Seaboard Airlines Ry. Co. v. United States,* 261 U.S. 299 (1923). He is entitled to his damages (losses) inflicted by the taking. And the interest rate should be one which is "proper", "fair", and "reasonable".[17]

There has been a serious and substantial loss to Drake's Beach Estates as a result of the trial court's failure to assume its judicial responsibility to determine this element of just compensation, i.e., a proper and reasonable rate of interest. The difference between the 6% awarded and the 8.5% prevailing economic rate requested by Drake's Beach Estates as its true "market" loss for the period in question, from August 31, 1965 to the present date, is obviously quite substantial. This prejudicial error is aggravated when one considers the length of time over which this litigation has extended.

In conclusion, the government, in its Brief in Opposition, offers evidence which properly should have been offered to influence the trial court's fact-finding function at a proper hearing. The government's references to Standard & Poor's Trade and Securities Statistics, or other similar sources, is a tardy offer of evidence before the wrong forum, of the type of evidence which the government objected to and precluded in the trial court to deny this owner due process and just compensation.

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[17] *U.S. v. Klamath and Modoc Tribes,* 304 U.S. 119 (1938); *Phelps v. U.S.,* 274 U.S. 341 (1927); *Shoshone Tribe v. U.S.,* 299 U.S. 476 (1937); *Jacobs v. U.S.,* 290 U.S. 13, 17, 18 (1933).

The issue before this Court, and one which needs clarification is: Should the issue of the rate of interest be determined by the trial court or the jury. If this issue should be decided by the trial judge (as this owner contends, the government concedes, but to which the Court of Appeals does not agree) then the stage of the trial at which this owner attempted to offer its evidence (after verdict and before entry of judgment) was correct, and we respectfully urge this Court issue its writ of certiorari to require the trial court to require a hearing as to this limited issue, i.e., a reasonable rate of interest to *indemnify* this owner for its losses as a constitutionally required element of just compensation to which this owner is entitled. Unless this Court issues its writ of certiorari, the Ninth Circuit Court of Appeals' decision will stand for precedent to place evidence on this important issue before a jury, which, by *U.S. v. Reynolds,* 397 U.S. 14 (1970) should consider only "market value".

If this issue is for the jury, the government itself has misled the trial court and this owner into submitting evidence regarding interest to the Court. Evidence was offered to the trial court after the jury verdict. The error found by the Court of Appeals as to the timeliness and the procedure regarding this offer of evidence was caused by the government, not the owner.[9] The opinion of the Court of Appeals should be modified to so reflect. The owner in this case should have been permitted to proceed before the District Court based upon the procedure urged by the government at pretrial. In either event, the

government has caused error which is prejudicial to this owner. And the rule concerning this procedural matter needs expression by this Court.

---

## CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Burlingame, California,
June 11, 1973.

Respectfully submitted,

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